

FCC MAIL SECTION

Federal Communications Commission

DA 00-321

FEB 23 11 13 AM '00

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),)	MM Docket No. 98-55
FM Table of Allotments,)	RM-9255
FM Broadcast Stations.)	RM-9327
(Pleasanton, Bandera)	
Hondo, and Schertz, Texas))	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: February 9, 2000

Released: February 18, 2000

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making*, 13 FCC Rcd 7351 (1998 ("Notice"), issued in response to a petition filed by Reding Broadcasting Co. ("petitioner"), licensee of Station KBUC(FM), Channel 252A, Pleasanton, Texas. Petitioner requested the substitution of Channel 253C2 for Channel 252A at Pleasanton, Texas, and the modification of Station KBUC(FM)'s license accordingly. To accommodate this upgrade, the petition proposes the substitutions of Channel 290A for Channel 253A at Hondo, Texas and Channel 276A for Channel 252A at Bandera, Texas, a change of site for Hondo, and a modification of the licenses for Stations at Bandera and Hondo. It includes a pledge to reimburse the licensee at Bandera and the permittee at Hondo for their expenses in effectuating the channel substitutions and the change of transmitter site at Hondo, as well as an agreement to the site relocation signed by the permittee at Hondo.

2. Petitioner filed comments and a counterproposal.¹ North American Broadcasting Co. ("NABC"), an applicant at Karnes City, Texas, and Comal Broadcasting Company ("Comal") also filed comments and counterproposals. Reply comments were filed by petitioner, NABC, Comal, La Radio Cristiana Network, permittee of Station KAYG(FM), Camp Wood, Texas, and jointly by James Withers, licensee of Station KEEP(FM), Bandera, Texas and Five Points Broadcasting, Inc., permittee of Station KRBH(FM) Hondo, Texas.²

3. In response to the *Notice* proposing an upgrade at Pleasanton and related channel substitutions, petitioner filed comments and a counterproposal requesting the substitution of Channel 253C1 for Channel 252A instead of Channel 253C2, and a change of community from Pleasanton to Schertz, Texas, with the same related channel substitutions at Hondo and Bandera. NABC requests that alternate Channel 256A be substituted at Bandera, Texas instead of Channel 276A, with a related channel substitution of Channel 251A for Channel 256A at Camp Wood, Texas to make available a previously proposed site for the allotment at Karnes City.³ Comal requests, as an alternative to the upgrade at Pleasanton, the allotment of

¹ The community of Schertz, Texas, has been added to the caption.

² Late-filed comments in opposition were also filed by Cosmopolitan Enterprises of Victoria, Inc. These comments are unauthorized and will not be considered in this proceeding.

³ NABC is an applicant for Channel 276C2 at Karnes City, Texas. It has challenged this allotment in this

Channel 253C2 at Blanco, Texas, with the same related channel substitutions at Hondo and Bandera as proposed by petitioner.⁴

4. Petitioner filed its counterproposal pursuant to the provisions of Section 1.420(i) of the Commission's Rules which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. See *Report and Order* in MM Docket No. 88-526 ("*Change of Community R&O*"), 4 FCC Rcd 4870 (1989), *recon. granted in part* ("*Change of Community MO&O*"), 5 FCC Rcd 7094 (1990).⁵ In support of the proposal, petitioner states that the requested reallocation, which is mutually exclusive with its existing authorization on Channel 252A at Pleasanton, as well as its proposed allotment at Pleasanton, would fulfill a higher allotment priority by providing a first local aural service to Schertz, while Pleasanton will continue to receive local full-time service from AM Station KBOP. In support of its counterproposal, petitioner states that after it filed its original proposal for Pleasanton and while it reviewed possible transmitter site locations for that allotment, it discovered that its Station KBUC(FM) might be able to upgrade to a Class C1 station. It states that it has located a suitable and available tower which would accommodate this upgrade. However, it states that it cannot cover the community of Pleasanton with a city-grade signal from this site and thus the allotment of Channel 253C1 requires a change of community to Schertz from Pleasanton. It acknowledges that Schertz, a community of 14,014 persons, is partially in the San Antonio Urbanized Area and that Channel 253C1, if allotted, would cover over 99% of the San Antonio Urbanized Area with a 70dBu, or city grade, signal. It argues that the reallocation should be granted because the community of Schertz is separate and apart from the Urbanized Area and thus warrants an allotment to the community as a first local aural service. It offers an analysis of the community *vis á vis* the Urbanized Area and in support of its conclusion that the community is independent and not interdependent with the Urbanized Area, citing *Faye and Richard Tuck* ("*Tuck*"), 3 FCC Rcd 5374 (1988). In the alternative, petitioner requests that the Commission grant its proposal for channel 253C2 at Pleasanton if it determines that Schertz is not deserving of an allotment. Petitioner states that it will apply for either channel, if allotted.

5. NABC opposes petitioner's counterproposal at Schertz. It argues that petitioner's proposal to Schertz should be denied and its proposal to Pleasanton should be granted because the community of Schertz is interdependent with the San Antonio Urbanized Area and does not warrant a first local service preference under the FM allotment priorities. In addition, it claims that petitioner's representations regarding its proposed Channel 253C1 transmitter site at Schertz and its intention to serve the community of Schertz belie its actual intention to serve the San Antonio Urbanized Area. NABC also argues that the Commission should deny petitioner's

proceeding and in a previous proceeding, because the substitution of Channel 276A for Channel 252A at Bandera requires a site restriction of 16 km east of the community of Karnes City. See *Report and Order* in MM Docket 90-466 13 FCC Rcd 234 (1998) (*Hondo, Texas, et al.*).

⁴ We note that petitioner's original proposal for Pleasanton in this proceeding is the same proposal it filed in MM Docket No. 90-466 and was denied because the Hondo and Bandera allotments were short-spaced to Mexican allotments under the U.S./Mexican Agreement of 1972, which was in effect at the time they were filed. See *Report and Order* in MM Docket 90-466 13 FCC Rcd at 235 (1998) (*Hondo, et al.*). However, under the U.S./Mexican Agreement of 1992, the current treaty with Mexico, those allotments are fully spaced and the Mexican government has already approved them.

proposal to change community because a grant will further exacerbate the migration of stations from rural to urban areas.

6. In its reply comments, petitioner alleges that both the NABC and Comal counterproposals should be dismissed as defective. Petitioner claims that NABC failed to include coordinates for a site for the Karnes City allotment or an engineering report in support of its proposal for that site. Petitioner also alleges that Comal failed to include a statement from Five Points Broadcasting, Inc. that it is willing to change transmitter site to accommodate the allotment at Blanco. Petitioner also alleges that both counterproposals failed to include pledges to reimburse the licensees or permittees whose channels they proposed to substitute.

DISCUSSION

7. We will grant the proposal to Schertz as filed by petitioner. As a threshold matter, we agree with petitioner that Comal's counterproposal is defective. It failed to include a statement from Five Points Broadcasting, Inc., that it is willing to change transmitter site to accommodate the allotment at Blanco and failed to include pledges to reimburse the licensees or permittees whose channels they proposed to substitute.⁶ We also agree that NABC's counterproposal is defective and must be dismissed for its failure to include pledges to reimburse the parties at Bandera and Hondo for the costs associated with channel and transmitter site changes, but disagree with petitioner that the counterproposal contained insufficient engineering information.⁷ We note that even if each of these counterproposals were considered in a comparative analysis with petitioner's counterproposal at Schertz, they would not be chosen as a preferential arrangement of allotments. The proposal at Blanco, a first local service, would serve a smaller community and approximately one-tenth the number of persons.⁸ NABC's proposal at Bandera and Camp Wood would simply accommodate NABC's described technical difficulties and apparently speculative concerns about future improvements at Karnes City and the other involved communities, which do not establish a public interest benefit which could form the basis for a grant in a comparative analysis with Schertz. However, petitioner's proposal at Schertz would prevail in any event as a first local service under FM allotment priority three, whereas NABC's proposal would fall under priority four, other public interest matters. We note that NABC's application prevailed at auction at Karnes City, which it could amend to achieve its desired results using the various methods available to applicants, such as contour protection.

8. We believe that petitioner's showing has established the independence of Schertz from the San Antonio Urbanized Area. The allotment of Channel 253C1 could provide the community with its first local aural service while Pleasanton would retain local aural service from Station KBOP(AM). We do not question Schertz's status as a community for allotment purposes. However, we agree that this proposal must fulfill a majority of the eight interdependence criteria spelled out in *Tuck*. NABC accurately notes that the first two criteria support a finding that the proposal would serve the surrounding Urbanized Area rather than the

⁶ See *Report and Order* in Docket No. 16662 ("Circleville, Ohio"), 8 FCC 2d 159 (1967) (reimbursement); See *Report and Order* in MM Docket No. 88-519 ("Beaumont and Big Bear Lake, California"), 4 FCCRcd 7505 (1989)(transmitter site change).

⁷ NABC late-cured this reimbursement pledge. However, we cannot accept this cure because to do so would prejudice petitioner's rights. See *Report and Order* in MM Docket 97-26 ("Detroit, Howe and Jacksboro, Texas"), 13 FCC Rcd 16561 (1998) at ¶6; see also *Report and Order* in MM Docket 87-591 ("Scottsboro, Alabama, Trenton, Georgia, and Signal Mountain, Tennessee"), 6 FCC Rcd 6111 (1991).

⁸ The city of Blanco has a 1990 population of 1,238 persons and the proposal at Blanco would serve approximately 112,000 persons.

independent community. Schertz is partially located within the San Antonio Urbanized Area, and the allotment of a C1 Channel would cover over 99% of the Urbanized Area. Therefore, petitioner, in recognition of this, has provided information in support of its argument that Schertz is independent of the Urbanized Area and thus entitled to a first local service preference using the factors enumerated in *RKO General* ("KFRC"), 5 FCC Rcd 3222 (1990) and *Tuck*.⁹ In addition, petitioner has provided data regarding the areas and populations which would gain and lose service if Channel 253 C1 were allotted to Schertz.

9. Based on the showing presented by petitioner, we find that Schertz is a community independent of the San Antonio Urbanized Area. Although it does not fulfill all of the delineated eight factors, it does satisfy a majority of them, which is sufficient to demonstrate a community's independence. See *Tuck*; *Report and Order* in MM Docket No. 95-32 ("*Parker and St. Joe, Florida*"), 11 FCC Rcd 1095 (1996). First, petitioner states that it does not have information to prove where the residents of Schertz work, but that there are a good number of businesses located in Schertz to make employment available to a number of residents. While this may show that employment opportunities are available, it is not sufficient to establish that a majority of residents live and work in the community, as we have generally required. [cite] Second, petitioner shows that the city of Schertz is served by a monthly newsletter, as well as *The Herald*, a weekly publication that covers all local activities. The newspaper used by the city for publication of bids, employment openings, public hearings, and ordinances is the *Seguin Gazette-Enterprise*, which is published six days a week in the city of Seguin. NABC points out that neither newspaper is a Schertz publication; however, we note that since neither is a San Antonio publication, this does not establish interdependence. Furthermore, Schertz does have its own monthly newsletter, which in conjunction with the other papers minimally satisfies this criterion. Third, petitioner notes that the city of Schertz has a distinct history, that a number of businesses identify strongly with the city and include the word "Schertz" in their names, and that the City Secretary attests that the city government perceives itself as an autonomous community from San Antonio. While NABC challenges this on the basis that it is supported only by one letter from a city official, we believe this is a satisfactory showing with sufficient documentation. In addition, the letters NABC offered to support its allegation of interdependence do not

⁹ The three criteria considered in making a first local service preference determination are (1) signal to population coverage, i.e., the degree to which a station would provide coverage not only to the suburban community but to the adjacent metropolis as well, (2) the size and proximity of the suburban community relative to the adjacent city, and (3) the interdependence of the suburban community with the central city, established by the consideration of the following eight factors:

- (1) the extent to which community residents work in the larger metropolitan area, rather than the specified community;
- (2) whether the smaller community has its own newspaper or other media that cover the community's local needs and interests;
- (3) whether community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area;
- (4) whether the specified community has its own local government and elected officials;
- (5) whether the smaller community has its own telephone book provided by the local telephone company or zip code;
- (6) whether the community has its own commercial establishments, health facilities, and transportation systems;
- (7) the extent to which the specified community and the central city are part of the same advertising market; and
- (8) the extent to which the specified community relies on the larger metropolitan area for various municipal services such as police, fire protection, schools and libraries.

persuade us to the contrary, because they do not address or establish a majority of the *Tuck* factors. Fourth, petitioner proffers that the city has its own local government and elected officials and thus is independent. It shows that Schertz was incorporated by the State of Texas in 1958; it has a council-manager form of government and has an elected mayor. The City Manager is the Chief Administrative Officer. The city government has 144 full-time employees, including a Comptroller, Police Chief, Public Works Director, among others, and a Municipal Court Judge, Prosecutor, City Engineer, and City Auditor under contract. This is not disputed and is more than adequate to support a finding of independence. Fifth, the city of Schertz has one zip code, and post office, and is served by a telephone book separate from San Antonio. This is not challenged and we find it to be satisfactory. Sixth, the city has numerous commercial establishments, churches, VFW, DAV, Elks, Knights of Columbus, Lions, Kiwanis and Jaycees. Schertz does not have its own hospital, but it does have medical clinics and dentists and it has a veterinary clinic. This is an adequate showing in support of independence and is also not disputed. Seventh, with respect to the advertising market, petitioner provided no information. Eighth, the city has its own Police Department, Fire Department, schools and library. Its Public Works department provides water service, streets and parks, a city pool and animal control. Its school district, Schertz-Cibola Universal City School District, is independent of San Antonio. Its library has more than 40,000 volumes. All of these factors support a finding of independence.

10. With respect to NABC's allegations as to petitioner's intentions to serve the community, we find that there is no evidence to support these allegations. Petitioner did not allege that the site serving Schertz was the only site it could locate, nor was it required to allege this. With respect to NABC's concerns regarding possible abuse of the Commission's process in order to remove service from a rural area to move into an urban area, there is no prohibition on such a move as long as it complies with the Commission's FM allotment priorities. *See Change of Community R&O 4 FCC Rcd at 4873*. We have determined that this reallocation does comply with our FM allotment priorities and thus fulfills the public interest. No abuse has been demonstrated. As an additional point of fact, we note that petitioner pledged to reimburse both James Withers, licensee of Station KEEP(FM), Bandera, Texas for its reasonable expenses for changing frequency and Five Points Broadcasting, Inc., permittee of Station KRBH(FM) Hondo, Texas for its reasonable expenses of changing frequency and transmitter location.¹⁰

11. Petitioner also states, and a Commission staff engineering analysis confirms, that the proposed Class C1 station at Schertz will provide a 60dBu signal to over 1,300,000 persons. The proposed change of community will also result in a small loss area of 374 square kilometers with a population of 1,044 persons; this area will continue to receive service from at least five radio stations.

12. The allotment of Channel 253C1 at Schertz, Texas, can be made at petitioner's requested site 44.1 kilometers (27.4 miles) west of the community.¹¹ The allotment of Channel 276A at Bandera can be made at Station KEEP(FM)'s licensed site.¹² The allotment of Channel 290A at Hondo can be made with a

¹⁰ Attached to both the Petition for Rule Making and the Counterproposal is an agreement between petitioner and James Withers and Five Points Broadcasting, Inc., showing the amount petitioner has agreed to pay expenses for the affected parties' changes. In accordance with previous policy, we expect this amount to be limited to the parties' reasonable out of pocket expenses in connection with the frequency change and the transmitter site change. *See Circleville, Ohio*, 8 FCC2d 159(1967).

¹¹ The coordinates for Channel 253C1 at Schertz are 29-31-25 and 98-43-25.

¹² The coordinates for Channel 276A at Bandera are 29-51-22 and 99-05-25.

site restriction of 10.4 kilometers (6.4 miles) west of the community.¹³ We note that these communities are located within 320 kilometers (199 miles) of the U.S.-Mexico border, and concurrence of the Mexican government has been received for these allotments.

13. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective April 3, 2000, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, as follows:

Community	Channel Number
Schertz, Texas	253C1
Bandera, Texas	276A
Hondo, Texas	290A

14. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Mark N. Lipp
Shook, Hardy and Bacon
801 Pennsylvania Ave., NW
Suite 600

James G. Withers
1921 Crampton Court
Chesterfield, MO 63017
(Licensee of Station KEEP(FM))

Washington, DC 20004
and

Gene A. Bechtel
Bechtel & Cole, Chartered
1901 L Street, NW
Suite 250
Washington, DC 20036
(Counsel for petitioner)

Five Points Broadcasting, Inc.
9450 Plainfield Drive
Rock Hill, MO 63119
(Permittee of Station KRBH(FM))

Henry E. Crawford
Smithwick & Belendiuk
Handler
1990 M Street, N.W., Suite 510
Washington, DC 20036
(Counsel for Comal Broadcasting Co.)

Bruce A. Eisen
Kaye, Scholer, Fierman, Hays &
901 15th Street, NW
Washington, DC 20005
(Counsel for North American
Broadcasting Co.)

15. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the authorization of Station KBUC(FM) IS MODIFIED to specify operation on Channel 253C1 at Schertz, Texas in lieu of 253A at Pleasanton, Texas, the authorization of Station KRBH(FM) IS MODIFIED to specify operation on Channel 290A in lieu of Channel 253A, and the authorization of Station KEEP(FM) IS MODIFIED to specify operation on Channel 276A in lieu of Channel 252A, subject to the following conditions:

¹³ The coordinates for Channel 290A at Hondo are 29-21-00 and 99-15-00.

- (a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;
- (b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and
- (c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

16. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change in community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Reding Broadcasting Company, licensee of Station KBUC(FM), Pleasanton, Texas is required to submit a rule making fee in addition to the fee required for the applications to effectuate the upgrade of its license from Channel to Channel .

17. IT IS FURTHER ORDERED, That this proceeding BE TERMINATED.

18. IT IS FURTHER ORDERED, That the petitions filed by North American Broadcasting Company and Comal Broadcasting Company ARE DISMISSED.

19. For further information concerning the above, contact Victoria McCauley, Mass Media Bureau, (202) 418-2130.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau